IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES, *Petitioner,*

v.

BELL AIRCRAFT CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 101) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 2, 1951 (R. 135). Upon timely application, the time for filing petition for certiorari was extended to January 30, 1952 (R. 136). The jurisdiction of this Court is sought to be invoked under U.S.C. Title 28, Section 1255 (1).

QUESTIONS PRESENTED

The Court below gave respondent judgment for those portions of certain capitalized experimental, development and production tooling costs which respondent charged to four cost-plus-fixed-fee contracts with petitioner for the manufacture of P-39 military airplanes. Proper portions of such deferred costs were clearly reimbursable under the terms of the contracts. No specific consideration was given the question of reimbursement of these costs in the negotiation of the contracts, and, at the time, respondent did not intend to seek reimbursement. Part of the costs were allowed by one Contracting Officer and paid. The remainder was disallowed by a successor Contracting Officer. The amount paid was recouped by action of the General Accounting Office. The decision of the second Contracting Officer was appealed to the War Department Board of Contract Appeals, which made its own findings of fact and disallowed the vouchers before it. The fact findings of the Court of Claims were in all respects the same as those of the Board of Contract Appeals. The questions presented are:

1. Did the Court of Claims correctly rule that since the contract terms clearly made these costs reimbursable and no specific consideration was given to the question of the reimbursement in the negotiation of the contracts, respondent could recover notwithstanding the fact that the accounting method respondent was using at the time three of the CPFF contracts were entered into evidenced a lack of intent to seek reimbursement?

2. Did the Court of Claims correctly rule that since the Board of Contract Appeals and the Court of Claims made the same findings of fact, the only issue was one of law as to which the disputes clause of the contracts

did not give finality to the decision of the Board of Contract Appeals?

Petitioner claims that the case presents questions (a) as to the finality of the decision of the first Contracting Officer and (b) as to the Court of Claims inconsistency in giving it finality while holding reviewable the decision of the Board of Contract Appeals affirming the second Contracting Officer. This case does not present these questions because the Court of Claims actually reviewed the decision of the first Contracting Officer on its merits and sustained it.

CONTRACT AND REGULATION PROVISIONS INVOKED

Pertinent portions of the contract and provisions of the regulations are set forth in the Appendix to the Petition at pages 19 through 24.

STATEMENT OF THE CASE

Respondent sued on four cost-plus-fixed-fee contracts, hereinafter referred to as CPFF contracts, with the United States for the manufacture and delivery of military aircraft known as P-39's. The scheme of each of these contracts was that the contractor would be reimbursed for his manufacuring costs and would, in addition, receive a fixed fee for performing the contract (R. 77). The amount of the fee was arrived at by negotiations between the parties and cost estimates submitted by the contractor were considered in the negotiations (R. 91, 126). However, there were no negotiations between the parties about the contract terms relating to cost reimbursement. Each contract provided that (R. 78):

> "... allowable items of cost will be determined by the Contracting Officer in accordance with Regulations for determination of the cost of performing a Contract as promulgated by the Treasury Depart-

ment in Section 26.9 of Chapter 1 of Title 26 of Code of Federal Regulations, as contained in T.D. 5000 and approved by the Secretary of War August 2, 1940."

TD 5000 (R. 78-80) was promulgated under the so-called Vinson Act, as amended by the Act of June 28, 1940 (54 Stat. 676), and was approved by the Secretaries of the Navy and the Treasury, as well as the Secretary of War.

The first Contracting Officer who passed on the questions whether certain experimental, development and production tooling costs were properly payable to respondent under the terms of TD 5000 decided that the costs were reimbursable and approved the vouchers which were before him (R. 85). The record shows that some of this Contracting Officer's subordinates recommended against the allowance of the vouchers and that others recommended that they be allowed (R. 85). While the approval of the vouchers did not require any express findings of fact, the fact that they were approved clearly means that to the extent the Contracting Officer decided fact issues he decided them in favor of respondent and that to the extent he decided legal issues he likewise decided these in favor of respondent. Plaintiff was paid $1,299,856.02, the amount allowed by the first Contracting Officer (R. 85). This amount was subsequently recouped by action of the General Accounting Office from other money due from petitioner to respondent (R. 87-88).

Another series of vouchers for $986,963.93 was submitted to a successor Contracting Officer, who held that respondent was not entitled to reimbursement (R. 86). These vouchers were for additional amounts of the deferred costs and the question of their reimbursability

was exactly the same as the question of reimbursability of the vouchers approved by the first Contracting Officer. The second Contracting Officer's decision was appealed to the War Department Board of Contract Appeals (hereinafter called the Board) which made its own findings of fact (R. 91), but arrived at the same conclusion (R. 92). It did not approve or endorse the second Contracting Officer's findings of fact.*

The Court of Claims found that the second Contracting Officer did not act upon the vouchers which had been approved by the first Contracting Officer (R. 115). The Board, in connection with the appeal from the ruling on vouchers presented to the second Contracting Officer, noted that "the parties considered the appeal to include only" the vouchers for $986,963.93, and consequently limited its decision to those (Tr. Stip. Ex. P, p. 10). Under these circumstances, petitioner's statement (Pet. 8-9) that "Respondent took no appeal from the [second] Contracting Officer's denial of the 1¼ million dollar claim. . . . " is misleading, for there was no occasion for such an appeal.

After the decision of the Board this suit was begun to recover the amount recouped by the General Accounting Office plus the amount disallowed by the Board. The Court of Claims gave respondent a judgment for both amounts (R. 101).

In the absence of a showing of fraud on the part of the Board, its fact findings are final and binding on respondent.

Respondent did not challenge the facts found by the Board. Respondent's position, which was sustained by

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* Petitioner, ignoring this fact, recites (Pet. 8) findings of fact made by the second Contracting Officer, which are obviously irrelevant in the light of the findings on appeal made by the Board of Contract Appeals.

the Court, was that the facts found by the Board clearly justified reimbursement of the costs. The Board findings upon which respondent relied were the following (R. 90):

> "There is no dispute between the parties as to the amount of the costs or as to the propriety of the method of allocation used by appellant. . . .
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> "The experimental and development costs are clearly within the category of indirect costs as defined by T.D. 5000 and are specifically covered by Section 26.9(d) of T.D. 5000—set out above. . . . Section 26.9(e)(5)(D) of T.D. 5000 set out above also provides that charges for depreciation of property used in the manufacturing process may be treated as an item of cost. It is clear from the record and evidence that the production tooling was used in the performance of CPFF contracts calling for the production of the P-39 type of airplane. It would seem, therefore, that items of this type are within the intent and meaning of T.D. 5000."

The experimental and development costs were incurred by respondent between 1936 and 1939 in connection with the manufacture of experimental airplanes. Since the experiments had resulted in new aeronautical designs and principles of value to respondent, their cost to respondent was capitalized in order that it might be charged off against production contracts for airplanes incorporating the new designs and principles. As the Board found, *supra*, the P-39's manufactured under the CPFF contracts incorporated these designs and principles.

Beginning in 1939 respondent entered into a series of fixed-price contracts for P-39's with both the British Government and the United States (R. 70). To

perform these contracts, and in anticipation of others, respondent acquired a large amount of production tooling usable only for the manufacture of P-39's (R. 72). The cost of this tooling was capitalized in order that it might be charged off against production contracts on which the tooling was used (R. 73). As the Board found, the tooling was used in the manufacture of P-39's under the CPFF contracts.

The findings of fact of the Board and the Court of Claims were the same on every point. The administrative decision and the Court's decision differed only in the result. The difference depended wholly upon the legal significance of certain undisputed facts which are, respondent believes, unique.

When production under the fixed-price contracts started in 1940 the respondent began to charge off the experimental, development and tooling costs it had capitalized (R. 76). Beginning in 1941 respondent began to enter into CPFF contracts for P-39's (R. 76). However, despite the fact that the CPFF contracts were for the manufacture of the same airplanes as were being manufactured under the fixed-price contracts, respondent, on its books, treated all the experimental, development and tooling costs as costs of the fixed-price contracts (R. 74). Upon an audit of respondent's tax returns, however, the Bureau of Internal Revenue took the position that, since the new aeronautical principles and designs were incorporated in all P-39's, and since the tools were being used to manufacture P-39's under the CPFF contracts, the whole amount of the deferred experimental, development and tooling costs was not a cost of performing the fixed-price contracts but was, in part, a cost of performing the CPFF contracts (R. 81). The Bureau insisted that respondent revise its books to reflect the true

facts. Since the Bureau's position was unquestionably correct respondent, after an initial period of remonstrance on other grounds, restored the proper amount of the costs to its books (R. 84). Respondent then requested reimbursement for the costs so restored under the terms of the CPFF contracts (R. 85).

As has been pointed out, part of the restored costs was allowed by the first Contracting Officer, paid to respondent and later recouped by petitioner. The remainder was disallowed by the Board principally because no portion of these costs was included in the cost estimates respondent submitted for the purpose of negotiating the fixed fees under the CPFF contracts, and because respondent's accounting at the time the CPFF contracts were entered into did not contemplate reimbursement for the costs. The Board concluded from the latter fact that *respondent* had no intention of seeking reimbursement of the costs at the time the contracts were negotiated (R. 91).

Petitioner's treatment of this point is less than candid. At six places in the petition, beginning with the Questions Presented, petitioner states in substance that at the time the contracts were made *both* parties contemplated that the costs would not be reimbursable. (Pet. 2, 4, 10, 14, 16, 17). At no place does petitioner advise the Court that this is *petitioner's fact contention* based upon the portion of the dissenting opinion of Judge Madden quoted at page 9 of the petition and *not supported by the facts found by the Board and the majority of the Court of Claims.* On this point the Board said (R. 91):

> "It is clear from the record that no portion of these costs was included in the estimates under the CPFF contracts and *no specific consideration was given to the question of reimbursement in the*

negotiation of the subject contracts." (Emphasis added)

The Board and the majority of the Court found that respondent's conduct during the negotiation of the CPFF contracts indicated that *respondent* had no intention of claiming reimbursement for the costs at that time.* Neither of them found that *both* parties had this intention and they both found that the contract terms clearly provided for reimbursement (R. 91, 126-129). Petitioner skips from the fact that respondent did not intend to claim reimbursement for certain costs to the conclusion that both parties intended that such costs should not be reimbursable under the contract.

That, as the Board found, the reimbursement of these particular costs was never specifically considered in connection with the negotiation of these particular contracts is crystal clear from the fact that all contracts incorporated, without the change of a single term, the provisions of Section 26.9 of TD 5000, a Treasury regulation promulgated long before the first of these contracts was signed.

The Court below concluded that respondent's intention was not a pertinent fact which kept it from recovering in the circumstances of this case (R. 128).

There was no question of unconscionable profit on the part of the respondent. The contracts were subject to renegotiation and part of respondent's recovery in this case must be paid to the petitioner under an existing renegotiation agreement (R. 132). In addi-

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* Both the Board and the Court were partially wrong in this conclusion because the Contracting Officer entered into the fourth and final CPFF contract with respondent shortly *after* he had approved for reimbursement the first vouchers respondent submitted claiming the experimental, development and tooling costs (R. 77, 84-86).

tion, since all the costs involved here were actually allowed for tax purposes, although spread over all the years during which respondent performed both the fixed-price and CPFF contracts, the entire amount of respondent's recovery will add to its net income and thus be taxable.

REASONS FOR DENYING THE WRIT

There are three reasons for denying the writ:

I. No important issue of Federal law is involved. The case raises only one ordinary question of contract law which depends entirely upon the facts of this particular case, and which was correctly decided by the Court of Claims.

II. The case does not involve a construction of the standard disputes clause. The Board of Contract Appeals decided certain legal questions on the basis of findings of fact which respondent did not dispute. On the same facts the Court of Claims reached contrary conclusions of law. The disputes clause makes the administrative decision binding as to facts only.

III. The case does not raise a question as to the finality of a Contracting Officer's allowance of costs under contractual provisions similar to Section 3 of the contracts sued on for the reason that here both the first Contracting Officer's determination and the decision of the Board of Contract Appeals were reviewed both as to the facts and the law by the Court of Claims. The determination of the first Contracting Officer was affirmed on both the facts and the law; the facts found by the Board of Contract Appeals were approved but its decision on the law was reversed. Furthermore, the

Court of Claims considered the finality of the Contracting Officer's allowance only in connection with petitioner's claim that respondent had not exhausted its administrative remedies.

I

THE CASE RAISES ONLY AN ORDINARY QUESTION OF CONTRACT LAW DEPENDING ENTIRELY ON THE PARTICULAR FACTS INVOLVED. THE ISSUE WAS DECIDED CORRECTLY.

The only substantial question in this case was whether recovery was precluded by the fact that at the time the CPFF contracts were negotiated respondent did not intend to claim reimbursement for the experimental, development and production tooling costs.* The legal effect of this intention, in the light of the other circumstances of the case, including the fact that a contrary intention was clearly expressed by the contracts, raised only an ordinary question of contract law. The Court of Claims, while agreeing with the Board as to the fact of respondent's intention, found that it was not a "condition" or "pertinent fact" which made the costs non-reimbursable under the CPFF contracts (R. 128). The Court pointed out that the respondent was under no contractual obligation to request reimbursement for any particular cost, but that the contracts did obligate the Government to reimburse respondent for any cost made reimbursable by the contracts if, as here, reimbursement was requested (R. 128).

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* Although the Board of Contract Appeals relied principally on this intention in denying respondent relief, it made a number of subsidiary fact findings upon which it also relied. None of these fact findings were in dispute. The Court of Claims dealt with each of them separately and held each of them without legal significance in this case. Petitioner does not mention any of these subsidiary issues and apparently does not rely on them.

That this holding was right is clear from the following material and decisive facts, all of which appear either in the contracts themselves or in the opinion of the Board of Contract Appeals (R. 90), and some in both places:

(a) The parties did not give any specific consideration to the costs sued for while the contracts were being negotiated (R. 91).

(b) The terms of the contracts which defined what were allowable costs were written by the petitioner long before these contracts were entered into and were not decided upon as a result of negotiations for these particular contracts (R. 78).

(c) The contract terms were not ambiguous and clearly made such costs reimbursable, thus expressing an intention contrary to that evidenced by respondent's accounting practices at the time the contracts were signed (R. 90, 125).

(d) The production tooling was used in the manufacture of P-39's and thus a proper portion of the costs of the tooling was a cost of manufacturing P-39's under the CPFF contracts (R. 124, 130).

(e) P-39's manufactured under the CPFF contracts incorporated the aeronautical designs and principles resulting from respondent's experimental and development work, and thus a proper portion of the cost of those designs and principles was a cost of manufacture under the CPFF contracts (R. 123, 130).

We submit that the question of which of the undisputed facts peculiar to this case are legally material is simply a question of ordinary contract law, and that no question of general interest or importance is raised. We also submit that the Court of Claims correctly ruled that the case was governed by the fact that the costs

sued for were actual costs of manufacturing the P-39's under the CPFF contracts and that the contract terms clearly made them reimbursable.

II

THE FACTS FOUND BY THE COURT OF CLAIMS WERE THE SAME AS THOSE FOUND BY THE BOARD OF CONTRACT APPEALS AND THE DISPUTES CLAUSE OF THE CONTRACTS DID NOT MAKE THE DECISION OF THE BOARD ON LEGAL QUESTIONS BINDING ON THE COURT OF CLAIMS.

The question of which of the facts found by the Board of Contract Appeals were controlling was clearly a question of law as to which respondent was not bound by the decision of the Board of Contract Appeals under the disputes clauses of the contracts which made the Board's determination final and conclusive on "all disputes concerning questions of fact" (R. 80, 81).

Petitioner says that "The sole inquiry therefore in this case was whether and to what extent the costs had been *incurred* as a necessary incident of performance of the CPFF contracts", and that such an inquiry is "obviously a question of fact" (Pet. 14, emphasis added). This is a complete misstatement of the issue. The terms of TD 5000 clearly make current charges for capital assets used in the performance of the contracts reimbursable, no matter when the cost of such capital assets was incurred, or for what reason (R. 79). There is no question about the proper portion of these particular capital assets being an actual cost of performing the CPFF contracts. The first Contracting Officer, the Board of Contract Appeals and the Court of Claims all held that they were. The Board of Contract Appeals held that nevertheless certain other undisputed facts precluded respondent from recovering. The Court of Claims simply held that they did not.

That the Board was deciding a question of law is clear from its own opinion (R. 90, 118-119).

III

A RULING BY THIS COURT THAT THE DECISION OF THE FIRST CONTRACTING OFFICER WAS NOT FINAL AND BINDING ON PETITIONER WOULD NOT CHANGE THE RESULT.

Petitioner states that the Court of Claims held that the decision of the first Contracting Officer under Section 3 of the contract was final and binding on the Government (Pet. 10); that Section 3, in substance, is used widely in Government contracts (Pet. 16); and that this question is one of wide general interest.

Actually, the decision of the first Contracting Officer allowing vouchers for one and one-quarter million dollars of the costs sued for was reviewed on its merits both as to facts and law by the Court of Claims, and affirmed. Therefore, the case does not actually raise a question of whether the decision of the first Contracting Officer was binding on petitioner. Regardless of whether the Court had held the decision of the first Contracting Officer final and binding on the Government, or, on the contrary, fully reviewable, the Court's conclusion would have been precisely the same.

That the issue which petitioner seeks to raise is in fact moot is, in itself, an adequate answer to the petition in this respect. It may be well, however, since petitioner has not seen fit to do so, to explain briefly how the matter of the effect of the decision of the first Contracting Officer arose in the Court of Claims' opinion. The whole of this discussion was under the heading "Alleged failure of plaintiff [respondent] to exhaust its administrative remedies" (R. 109). *Petitioner* contended that the one and one-quarter million dollar claim was not before the

Court of Claims because the first Contracting Officer had been overruled by the second Contracting Officer and respondent had not appealed from *that* portion of the second Contracting Officer's decision (R. 113). The Court of Claims discussed the effect of the first Contracting Officer's decision *only* in connection with the contention of the petitioner that respondent had failed to exhaust its administrative remedies (R. 109-116).

In disposing of this contention, the Court of Claims held that the decision of the second Contracting Officer dealt only with the vouchers before him for action, that he did not reverse the decision of the first Contracting Officer (R. 115-116) and that, therefore, the respondent's suit in the Court of Claims for the amount of the approved vouchers was not barred.*

After discussing petitioner's administrative defenses, the Court said (R. 121):

> "We now turn to the parties' position concerning the merits of the controversy on the law and on the facts."

The Court then proceeded to discuss the merits of the whole case without regard to whether they were involved in the decision of the first Contracting Officer or of the Board.

Dissenting Judge Madden agreed that respondent's claim was not barred by failure to exhaust administrative remedies (R. 134), and the Court was unanimous on this point. Judge Madden did take the position that the Government would not be bound by a mistake of law on the part of the first Contracting Officer and that, therefore, questions of law decided by the first Contracting Officer were open for review by the Court of

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* The amount of these vouchers was paid and then recouped from other amounts owing from petitioner to respondent.

Claims (R. 135). The fact is, however, that the Court of Claims did review all questions of law which could have been decided by the first Contracting Officer, and resolved them all in favor of respondent (R. 121-132).

Just what the Court of Claims actually determined as to the effect of the decision of the first Contracting Officer, in the context of this procedural argument by petitioner as to the exhaustion of administrative remedies by respondent, is not wholly clear. Its remarks on the "conclusiveness of the decision" (R. 113, 116) are fully consistent with its conclusion that upon both the facts and the law the first Contracting Officer was correct. The review by the Court of Claims of the decision of the first Contracting Officer was not in any way confined to questions of fraud, good faith or honest judgment. The Court not only reviewed all the questions of law which could have been involved in the first Contracting Officer's decision but, in view of petitioner's attempt to overcome fact findings of the Board which were favorable to respondent, the Court also took evidence on and made findings about every fact in the case (R. 67-100). Its fact conclusions were the same as the Board's.

The consideration of petitioner's argument, however, shows that petitioner itself is guilty of urging the same kind of inconsistency with which it charges the Court of Claims on pages 9 and 10 of the Petition. There it charges that the Court held that the decision of the Board of Contract Appeals was not a dispute concerning questions of fact and could be judicially reconsidered and, at the same time, concluded that the decision of the first Contracting Officer against the United States on the identical question was binding and conclusive. As we have already demonstrated, this difference is only apparent, not real, for the reason that the Court of Claims actually reviewed the decision of the

first Contracting Officer on its merits. The position petitioner wishes this Court to take, however, is that the decision of the first Contracting Officer involved questions of law and was fully reviewable by the Court (Pet. 11), whereas the decision of the Board on the same issues involved questions of fact and was, therefore, final and binding on respondent under the disputes clause (Pet. 15).

CONCLUSION

For all these reasons we respectfully request that the petition for the writ be denied.

Respectfully submitted,

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March, 1952